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No. 08-1292

Supreme Court, U.S.
FILED
MAY 29 2009
OFFICE OF THE CLERK

IN THE

United States Supreme Court

LUIS ACOSTA,

Petitioner,

v.

CITY OF PHOENIX,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Dated: May 29, 2009

QUESTIONS PRESENTED

Whether in Mr. Acosta's case, EEOC complaint proceedings proved a ruse, depriving them and court proceedings based upon them, of all legitimacy.

Whether a "disparate treatment" test is even possible in a segregation case.

Whether Title VII retaliation is often a form of discrimination itself.

Whether Phoenix employees are a priceless resource in a time of economic adversity.

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PETITIONER'S REPLY BRIEF

Pursuant to Supreme Court Rule 15.6, Petitioner addresses the following new points, raised in the City of Phoenix's Brief in Opposition.

I. The City's and its printer's willful violation of the Court's service rules, with respect to the City's Brief in Opposition—withholding said Brief from Petitioner's counsel, while furnishing a false affidavit to conceal that fact—constitute (1) Title VII retaliation against Petitioner; (2) contempt of this Court, tending to a miscarriage of justice; and (3) both substantive and impeachment evidence of the essential falsity of the City's entire Brief.

Supreme Court Rules 15.3 and 29.3 require service on petitioner's "counsel of record," if petitioner has one. In the instant case, Petitioner's "Counsel of Record" is identified as such, both on the cover of the Petition for a Writ of Certiorari and on Page 16 of the Petition itself.

Cockle Law Brief Printing Co. of Omaha, Nebraska, was printer for ***both*** Petitioner and Respondent. The same Patricia Billotte gives the Affidavit of Service for ***both*** Petitioner's Petition and Respondent's Brief. In the case of the City's Brief in Opposition, Patricia Billotte swears that,

> "All parties required to be served have been served by third-party commercial carrier for delivery within 3 calendar days. Packages were

plainly addressed to the following:

SEE ATTACHED."
[Affidavit of Service of Opposition to Brief].

Attached to the Affidavit of Service is the name, address and phone number of "Mr. Luis Acosta," of Phoenix, Arizona. Mr. Acosta is listed as "Plaintiff/Appellant," rather than as Petitioner, perhaps to suggest a mistake instead of misconduct. Yet, the odds must approach zero that, neither the City's counsel nor Cockle Printing (let alone both!) knew Petitioner's Counsel of Record. Incidentally, Petitioner's counsel is located in Fairview Park, Ohio, a westerly suburb of Cleveland-not in Arizona, where Mr. Acosta resides.

What follows from these facts? First, the City's (and its printer's) conduct seems an obvious case of "discrimination" against Mr. Acosta,

> "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." [42 U.S.C. § 2000e-3(a).

Though the City's purpose in retaliating against Mr. Acosta is irrelevant to the existence of such retaliation, or to its unlawfulness; the City's purpose nevertheless seems clear, as well: to forestall a reply brief, and more generally, to deprive Mr. Acosta of the benefit of legal counsel in these proceedings. Again, Mr. Acosta's counsel is located in Ohio, not in Arizona, where Mr. Acosta resides.

Second, the City's violation of Supreme Court Rules 15.3 and 29.3 would appear to constitute con-

tempt of this Court's authority in all three senses of 18 U.S.C. § 401.

Third, a practical matter: Petitioner needed to ***find another printer***, to do a Reply Brief, which would raise the issue of defective service of the City's Opposition Brief; since Cockle Printing was at least equally (with the City) responsible for the bad service and for supplying a false affidavit concealing it.

Finally, Ohio's Evidence Rule 613 is more explicit than comparable Federal Evidence Rule 613, on the subject of impeachment for inconsistent conduct. In the instant case, the City's Brief in Opposition is impeached by the City's not sending it to Petitioner's Counsel of Record, as required by Supreme Court Rules ***and*** by the furnishing of a false affidavit, purporting to show compliance.

Unfortunately for the City, part of the transaction occurred ***in Ohio***, where Mr. Acosta's counsel is located. After inquiring of the Clerk's Office, about the propriety of the City's filing; Petitioner's counsel received in the mail three copies of the City's Brief in Opposition, together with a copy of the Affidavit of Service, showing service on Mr. Acosta. Cockle Printing Company's USPS Priority Mail envelope, containing the briefs and service affidavit, bore a USPS ball-stamp manual postmark, which is illegible!

Cockle Printing's Affidavit of Service shows service of the City's Brief in Opposition on Friday 15 May 2009 to "[a]ll parties required to be served."

Petitioner's counsel did not actually receive his copies from Cockle until Saturday 23 May 2009 at his office, over a week later!

The "Comments" to Ohio Evidence Rule 613, relating to Impeachment by Self-Contradiction, read in part as follows:

> This division applies only to the impeachment of a witness, including a party who testifies. It does not, however, apply to a party's inconsistent conduct that may be introduced on the merits; admissions by the conduct of a party (sometimes known as "implied admissions") may be admissible substantively and are not restricted by this rule. *See* 1 Giannelli & Snyder, *Baldwin's Ohio Practice Evidence § 401.8-.10* (1996) (adverse inferences: spoliation, admissions by conduct, failure to produce evidence or call witnesses).

So, both as substantive and impeachment evidence, the City's violation of Supreme Court Rules 15.3 and 29.3 comes in to contradict and undermine the whole of its Brief in Opposition-and every factual or legal assertion therein. As judges sometimes caution juries about evidence, such a document should be received with one's guard up!

Yet, the City's conduct in court is of a piece with the discrimination, harassment and retaliation, which Mr. Acosta experiences in the workplace on an almost daily basis.

II. The City's "Whopper": that the Ninth Circuit concluded Petitioner's EEOC charges were time-barred!

One will search in vain for a Ninth Circuit reference to time. [Petition App. 1-3]. The City is simply making it up—which may help explain, why the City was so anxious to keep its Brief in Opposition out of Petitioner's counsel's hands!

Yet, in at least four places in its Brief in Opposition, the City states or implies the Ninth Circuit concluded Petitioner's EEOC charges were untimely.

> Whether the Ninth Circuit Court of Appeals correctly dismissed the Petitioner's Title VII Claim relating to his transfer to Salt River Service Center because he failed, in his charge of discrimination filed with the Equal Employment Opportunity Commission, to timely submit his charge and thus failed to exhaust his administrative remedies. ["Counter Statement of Questions Presented," Opposition Brief, at Page i, Par, 1].
>
> The Ninth Circuit Court of Appeals correctly referenced and applied the statutory provisions relating to the timely filing of Title VII charges of discrimination and retaliation claims with the EEOC. [Opposition Brief, at 6].
>
> The Ninth Circuit Court of Appeals ***and*** the District Court before it, correctly analyzed the law, and the evidence properly before it,

> concluding that Petitioner failed to timely file the charge of discrimination/retaliation....[Opposition Brief, at 7 (emphasis added)].
>
> . . . [T]he Arizona Civil Rights Division . . . applied the facts of this case to the ***law on timeliness*** properly, to which the Ninth Circuit Court of Appeals ***reviewed and affirmed***." [Opposition Brief, at 8 (emphasis added)].

Repetition of falsehoods, even of "Whoppers," is a common propaganda technique. Though routinely effective, such repetition becomes uncommonly so; where the propagandist succeeds in depriving opponents of the ability to reply.

If anything, the Ninth Circuit appears to have resolved timeliness issues ***in favor of Petitioner*** and ***against the City***, by reaching the merits of Petitioner's Title VII discrimination and retaliation claims. [Petition App. 1-3]. After all, a whole section of the City's Answering Brief in the Court of Appeals was devoted to the timeliness issue. Section II of that Brief is titled, "Summary Judgment in Favor of Defendant was Compelled[,] as Mr. Acosta's Claims are Time Barred." [City's Answering Brief, at 10-12]. The odds would appear to approach zero that the Ninth Circuit somehow overlooked the City's timeliness defense.

Were this Court to believe, however, that there ***is*** an ambiguity or uncertainty in the Ninth Circuit's judgment, as to the timeliness of Petitioner's EEOC

charges; should not the Ninth Circuit itself be asked to ***resolve*** that ambiguity or uncertainty, via a "Remand for Clarification"?

> ". . . The Supreme Court has recognized the authority to remand for clarification judgments that suffer from ambiguity, particularly when the ambiguity implicates jurisdictional concerns. *See, e.g., Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (remanding because there was "'considerable uncertainty as to the precise grounds for the decision[ ]'" from which the appeal was taken (quoting *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 555 (1940))); *see also Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986) (remanding for clarification due to the "lack [of] an adequate explanation of the basis for the Court of Appeals' judgment"). The Courts of Appeals in general and our court in particular have recognized that a remand for clarification is appropriate where a judgment is ambiguous. [Jang v. Boston Scientific Corp. US Ct. of Appeals Fed. Cir. 2007-1385 (July, 2008)].

The failure of the Court of Appeals, Ninth Circuit, even to mention untimeliness, as a possible ground of its decision (if it were such a ground), placed Mr. Acosta at great disadvantage in urging a rehearing—and at similar disadvantage before this Court. Why would Mr. Acosta re-argue a point in the Court of Appeals he had apparently won? Accordingly, Mr. Acosta's Petition For Rehearing

En Banc, reproduced in full at Petition App. 34-44, makes no mention of the asserted untimeliness—just as the Ninth Circuit had not. [Petition App. 1-3].

Likewise, Mr. Acosta's Petition to this Court does ***not*** address the timeliness of his EEOC charges, now strenuously denied by the City in its Opposition Brief. The parties, it would seem, hold diametrically opposing views as to what, if anything, the Court of Appeals decided, as to the timeliness of Mr. Acosta's EEOC charges—making a remand for clarification of the Ninth Circuit's decision fully appropriate here.

III. The City is estopped from arguing untimeliness, because of admissions on its website and in-court misconduct.

The City devotes Page 8 of its Opposition Brief to arguing that 180 days is the time limit in Arizona for filing EEOC claims. But the City's own website belies this contention—at least with respect to City of Phoenix employees (or job applicants), such as Mr. Acosta, and probably as to all. [Federal Evidence Rule 613].

> City Employment
>
> Any City employee and/or job applicant who believe that he/she has been discriminated against in any aspect of employment or its process, may file a formal complaint of discrimination with the Equal Opportunity Department. Complaints of discrimination or harassment on the basis of race, color, reli-

> gion, sex, age, disability or sexual orientation must be filed within 180 days of the alleged act(s) of discrimination. ***The 180 day time limit does not affect the complaint rights of those filing external complaints with federal/state agencies.*** An employee may also select to file an internal complaint within his/her own department. Job applicants may avail themselves of filing an internal complaint through the Personnel Department if they so choose. [emphasis added].
>
> City Employment Discrimination Complaint Questionnaire Form (a hyperlink) [http://phoenix.gov/EOD/complnts.html], as of 26 May 2009.

As important, the time limits for filing EEOC charges are ***not jurisdictional***, despite the City's suggestion they are:

> As noted in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), the filing period is not a jurisdictional prerequisite to filing a Title VII suit. Rather it is a requirement subject to waiver, estoppel, and equitable tolling "when equity so requires." *Id.*, at 398. [*National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 121 (2002)].

Equity would appear to require that the City stop—

- Taking positions in court, contrary to the information supplied the public on its website;

- Misrepresenting court decisions, in cases to which the City is a party, making it appear the court, either decided issues it did not address, or decided those issues differently than it actually did; and,
- Serving court briefs and other papers on the wrong people, in an attempt to gain a tactical advantage.

The easiest way to stop the City's resort to prohibited practices is to take away, via estoppel, the benefit or perceived benefit the City derives from resorting to them.

IV. Title VII contains no express or implied exception, permitting municipalities to segregate employees. Nor are municipalities entitled to the use of special rules of procedure or of evidence, in determining whether they have in fact segregated their employees.

According to Civil Rule 56(c), summary judgments are rendered, if at all, on "the pleadings, the discovery and disclosure materials on file, and any affidavits. . . ." There must be "no genuine issue as to any material fact and . . . the movant [must be] entitled to judgment as a matter of law." [*Id.*].

From the first, Mr. Acosta complained to the EEOC, that,

> "I'm being subjected to harassment in the form of being segregated in my position of

"Trades Helper." [Petition App. 57; discussed at Petition 4-8].

Six times at his deposition, Mr. Acosta discusses "the segregation issue." [Deposition of Luis Acosta (20 July 2006), at 7:12; 95:11; 107:16; 108:23; 137:1 and 140:18].

The City's counsel prefers to treat this Title VII case as a personal injury one, and Mr. Acosta indicates "feelings of chest tightening" [*Id.*, at 107:11-12]; and "stress, anger, frustration" [*Id.*, at 108:25]. "The pain is both in your chest, and it travels into your arms. It travels into your head, headaches, whatever the case may be." [*Id.*, at 108:25 and 109:1-3]. Mr. Acosta's personal physician prescribed Valium for him, on account of these complaints. [*Id.*, at 109:13].

Mr. Acosta describes segregation, indeed his segregation, as "not being able to have camaraderie with co-workers, being treated differently" [*Id.*, at 108: 23-24]; and later as ***"that isolated desk"*** [*Id.*, at 137:1-2 (emphasis added)]; "extreme duress" [*Id.*, at 95:11]; and that "the Jim Crow law was being applied." [*Id.*, at 94:4]. "Probably 50 people at Metro Facilities" asked Mr. Acosta "why [he] was isolated from all co-workers." [*Id.*, at 91:15-16]. Mr. Acosta ***"began drinking more"*** [*Id.*, at 96:2 (emphasis added)].

So, the notion of ***beneficial segregation***—segregation actually sought after by employees—is exploded, as the naivety of those who have never

actually experienced it! [Petition App. 10-13, 23-25].

The segregation of Mr. Acosta ceased 11 April 2005 exactly 31 days after Mr. Acosta filed his EEOC charge on 11 March 2005.

The issue on summary judgment was not whether ***others*** may have disputed Mr. Acosta's account of his segregation by the City; ***its duration (over eight months***, from 24 July 2004 to 11 April 2005); its severity; or the validity of Mr. Acosta's medical complaints. Such disputes, if they existed, were for the jury alone to resolve.

Rather, the issue was whether Petitioner had supplied evidentiary material, of the type specified by Civil Rule 56(c), showing or tending to show prohibited workplace segregation. The very fact the District Court refuses, simply refuses, to discuss the City's treatment of Mr. Acosta as "segregation" is strong evidence that such treatment ***was*** prohibited Title VII segregation! [Petition App. 4-29].

Why should the lower federal courts have indulged the City, as to the sufficiency of Mr. Acosta's discrimination/retaliation claims—to the extent of depriving him of trial by jury? What had Mr. Acosta, an American-Hispanic veteran, ever done to the City—save living and working there—to warrant withholding the courts' intervention against segregation in the workplace?

In applying the equitable doctrine of "Unclean Hands," as the lower federal courts appear to have done,

> "[t]he relative extent of each party's wrong upon the other and upon the public should be taken into account, and an equitable balance struck. [*Republic Molding Corp. v. B.W. Photo Utilities*, 319 F.2d 347, 350 (9th Cir., 1963)].

Unclean hands is "not actually a defense, but a concept designed ***to protect the court from becoming a party to the transgressor's misconduct***". [*United Cities Gas Co. v. Brock Exploration Co.*, 995 F. Supp. 1284, emphasis added].

In attempting to describe or define the doctrine of "unclean hands," the Fifth Circuit adopted with apparent approval, jury instructions reading in part as follows:

> A party is said to possess "unclean hands" if it is guilty of conduct involving fraud or bad faith. If you find that either party acted in a fraudulent, underhanded, unfair or unjust manner then you may conclude that party had "unclean hands." [*Alcatel USA, Inc., v. DGI Technologies, Inc.*, 166 F.3d 772 (5th Cir., 1999)]

Not even the City asserts—nor could it very well assert—that five-year-old "complaints about [Petitioner's] behavior from numerous co-workers" somehow justified or excused segregating Mr. Acosta contrary to Title VII. [Opposition Brief, at 1-2]. That so-called group grievance [Petition, at 7; Petition App. 5-6; Opposition Brief, at 1-2], false as it was in its assertions, was addressed to issues other than segregation. [Opposition Brief, at 1-2].

So, if not a prohibited penalty for some workplace rules infraction; what was the segregation here, other than malicious, completely arbitrary Title VII discrimination?

CONCLUSION

Why indulge the City at all—substantively, procedurally or in any other legal way? Why continue to make excuses for the City's misconduct? Such indulgence seems only to have ***emboldened*** the City, whose conduct grows ever more reckless towards its employees.

This case should ultimately be tried. But before any trial, the cause should be remanded to the Court of Appeals for clarification of the timeliness of Mr. Acosta's EEOC charges, as suggested in Section II, above. A remand for clarification will allow the Ninth Circuit to address ***explicitly*** the timeliness issue, which that court simply did not do in its decision. [Petition App. 1-3].

Respectfully submitted,

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